



SENATE FINANCE & CLAIMS
Exhibit No. 32
American Civil Liberties Union
of Montana
Date 4-8-13
P.O. Box 1317
Billings, MT 59624 HB 2
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INDIGENT DEFENSE IN MONTANA

Inadequate indigent defense has been an issue for decades. In fact, Montana first began examining the issue 35 years ago when the National Legal Aid and Defender Association received a grant from the federal Law Enforcement Assistance Association (LEAA) to provide technical assistance to state indigent defense systems.

1974: LEAA established the National Center for Defense Management (NCDM) whose mission was "to improve the efficiency of systems for the defense of the poor, to maximize their quality and to maintain their cost-effectiveness through sound planning, management assistance and management training."

1975: The Montana Legal Services Corporation Board of Trustees urged the Montana Board of Crime Control to request a technical assistance grant from NCDM to interview representatives of various Montana organizations and agencies, soliciting their views concerning indigent defense services in the state. They focused their analysis on three jurisdictions -- Yellowstone County, Flathead County, and the 16th Judicial District (Fallon, Powder River, Carter, Custer, Rosebud, Prairie and Garfield Counties).

1976: NCDM issued their report *Montana Statewide Defender Systems Development Study* finding that the failure of practitioners to adhere to prevailing criminal justice standards was not simply an "occasional omission" or "isolated defect," but the result of a "substandard system of indigent criminal justice."

2002: The American Civil Liberties Union (ACLU) filed a class action lawsuit against the State of Montana alleging constitutional deficiencies in the delivery of the right to counsel (*White v. Martz*). In addition to Governor Martz, defendants included the Supreme Court Administrator; Appellate Defender Commissioners; District Court Council members; and county commissioners from Missoula, Butte-Silver Bow, Flathead, Glacier, Lake, Ravalli and Teton counties.

Defendants moved to have the suit dismissed. Their motions were denied in their entirety by the Court.

An order granted class certification to all indigent persons who had or would have cases pending in the courts of those counties and who relied on those counties and the relevant county commissioners to provide them with defense counsel.

Plaintiffs conducted extensive discovery, including taking the depositions of more than 80 witnesses, including then current and former public defenders from each of the seven counties in the suit, various state and county officials, and members of the Appellate Defender Commission.

2003: The Montana Legislature made an attempt to address some of the issues raised by the complaint but it was too little, too late. The Interim Law and Justice Committee then took on indigent defense as



its highest priority. Rep. Mike Lange chaired that committee. Harry Freeborn served as the legislative counsel staff person for the committee.

A pre-trial scheduling order was signed by the Court in December 2003, and a trial date was set for the following May. Plaintiffs and defendants provided each other with expert witness disclosures, intended trial exhibits and deposition designations in accordance with the pre-trial scheduling order.

March 2004: At a meeting of Interim Law and Justice Committee, Mike Sherwood articulated the differences between what commissioners might expect in a criminal trial depending on whether they hired private counsel or had a public defender, showing Montana's two-tiered justice system -- one for people of means, and one for people without.

At that time the state of Montana approached the ACLU about a settlement.

All parties agreed that a properly funded statewide public defender system must have sufficient administrative and financial resources to ensure that indigent criminal defendants receive constitutionally and statutorily adequate legal representation and that the Montana State Legislature must be included in the formulation of a statewide system remedy.

May 2004: The Stipulation and Order of Postponement of Trial was agreed upon by the counsel in the case and signed by Montana State District Court Judge Thomas C. Honzel. *White v. Martz* was held in abeyance to permit the Montana State Legislature to pass legislation during its 2005 session to adequately address the indigent defense system.

April 2005: SB 146, sponsored by Sens. Dan McGee and Mike Wheat, was signed into law creating the Statewide Public Defender System. The law received unanimous support in the Senate and 89 percent support in the House.

August 2005: *White v. Martz* is dismissed.

July 2006: The Office of the State Public Defender assumed responsibility for statewide public defender services, previously provided by cities and counties. These services are now provided statewide through regional offices of the State Public Defender.

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

Black Letter

1 The public defense function, including the selection, funding, and payment of defense counsel, is independent.

2 Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

3 Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

5 Defense counsel's workload is controlled to permit the rendering of quality representation.

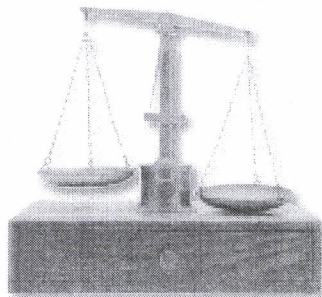
6 Defense counsel's ability, training, and experience match the complexity of the case.

7 The same attorney continuously represents the client until completion of the case.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

9 Defense counsel is provided with and required to attend continuing legal education.

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.



West's Montana Code Annotated Currentness
Title 47. Access to Legal Services
Chapter 1. Statewide Public Defender System
Part 1. General (Refs & Annos)

MCA 47-1-102
47-1-102. Purpose

The purposes of this chapter are to:

- (1) establish a statewide public defender system to provide effective assistance of counsel to indigent criminal defendants and other persons in civil cases who are entitled by law to assistance of counsel at public expense;
- (2) ensure that the system is free from undue political interference and conflicts of interest;
- (3) provide that public defender services are delivered by qualified and competent counsel in a manner that is fair and consistent throughout the state;
- (4) establish a system that utilizes state employees, contracted services, or other methods of providing services in a manner that is responsive to and respective of regional and community needs and interests;
- (5) ensure that adequate public funding of the statewide public defender system is provided and managed in a fiscally responsible manner; and
- (6) ensure that clients of the statewide public defender system pay reasonable costs for services provided by the system based on the clients' financial ability to pay.

Credits

Enacted by Laws 2005, ch. 449, § 3. Amended by Laws 2011, ch. 344, § 5, eff. July 1, 2011.

MCA 47-1-102, MT ST 47-1-102

Statutes are current with 2013 effective-upon-approval chapters through March 1, 2013, and the 2012 general election. Statutory changes are subject to classification and revision by the Code Commissioner.

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West's Montana Code Annotated Currentness
Title 47. Access to Legal Services
Chapter 1. Statewide Public Defender System
Part 1. General (Refs & Annos)

MCA 47-1-104

47-1-104. Statewide system--structure and scope of services--assignment of counsel at public expense

- (1) There is a statewide public defender system, which must deliver public defender services in all courts in this state. The system is supervised by the commission and administered by the office.
- (2) The commission shall approve a strategic plan for service delivery and divide the state into not more than 11 public defender regions. The commission may establish a regional office to provide public defender services in each region, as provided in 47-1-215, establish a contracted services program to provide services in the region, or utilize other service delivery methods as appropriate and consistent with the purposes described in 47-1-102.
- (3) When a court orders the office to assign counsel, the office shall immediately assign a public defender qualified to provide the required services. The commission shall establish protocols to ensure that the office makes appropriate assignments in a timely manner.
- (4) A court may order the office to assign counsel under this chapter in the following cases:
- (a) in cases in which a person is entitled to assistance of counsel at public expense because of financial inability to retain private counsel, subject to a determination of indigence pursuant to 47-1-111, as follows:
- (i) for a person charged with a felony or charged with a misdemeanor for which there is a possibility of incarceration, as provided in 46-8-101;
- (ii) for a party in a proceeding to determine parentage under the Uniform Parentage Act, as provided in 40-6-119;
- (iii) for a parent, guardian, or other person with physical or legal custody of a child or youth in any removal, placement, or termination proceeding pursuant 41-3-422 and as required under the federal Indian Child Welfare Act, as provided in 41-3-425;
- (iv) for an applicant for sentence review pursuant to Title 46, chapter 18, part 9;
- (v) for a petitioner in a proceeding for postconviction relief, as provided in 46-21-201;
- (vi) for a petitioner in a habeas corpus proceeding pursuant to Title 46, chapter 22;

- (vii) for a parent or guardian in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112;
 - (viii) for a respondent in a proceeding for involuntary commitment for a mental disorder, as provided in 53-21-116;
 - (ix) for a respondent in a proceeding for the involuntary commitment of a person for alcoholism, as provided in 53-24-302; and
 - (x) for a witness in a criminal grand jury proceeding, as provided in 46-4-304.
- (b) in cases in which a person is entitled by law to the assistance of counsel at public expense regardless of the person's financial ability to retain private counsel, as follows:
- (i) as provided for in 41-3-425;
 - (ii) for a youth in a proceeding under the Montana Youth Court Act alleging a youth is delinquent or in need of intervention, as provided in 41-5-1413, and in a prosecution under the Extended Jurisdiction Prosecution Act, as provided in 41-5-1607;
 - (iii) for a juvenile entitled to assigned counsel in a proceeding under the Interstate Compact on Juveniles, as provided in 41-6-101;
 - (iv) for a minor who petitions for a waiver of parental notification requirements under the Parental Notice of Abortion Act, as provided in [section 8];
 - (v) for a respondent in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112;
 - (vi) for a minor voluntarily committed to a mental health facility, as provided in 53-21-112;
 - (vii) for a person who is the subject of a petition for the appointment of a guardian or conservator in a proceeding under the provisions of the Uniform Probate Code in Title 72, chapter 5;
 - (viii) for a ward when the ward's guardian has filed a petition to require medical treatment for a mental disorder of the ward, as provided in 72-5-322; and
- (c) for an eligible appellant in an appeal of a proceeding listed in this subsection (4).

(5)(a) Except as provided in subsection (5)(b), a public defender may not be assigned to act as a court-appointed special advocate or guardian ad litem in a proceeding under the Montana Youth Court Act, Title 41, chapter 5, or in an abuse and neglect proceeding under Title 41, chapter 3.

(b) A private attorney who is contracted with under the provisions of 47-1-216 to provide public defender services under this chapter may be appointed as a court-appointed special advocate or guardian ad litem in a proceeding described in subsection (5)(a) if the appointment is separate from the attorney's service for the statewide public defender system and does not result in a conflict of interest.

Credits

Enacted by Laws 2005, ch. 449, § 4. Amended by Laws 2011, ch. 24, § 3, eff. July 1, 2011; amended by Laws 2011, ch. 307, § 11, eff. Jan. 1, 2013.

Notes of Decisions (6)

MCA 47-1-104, MT ST 47-1-104

Statutes are current with 2013 effective-upon-approval chapters through March 1, 2013, and the 2012 general election. Statutory changes are subject to classification and revision by the Code Commissioner.

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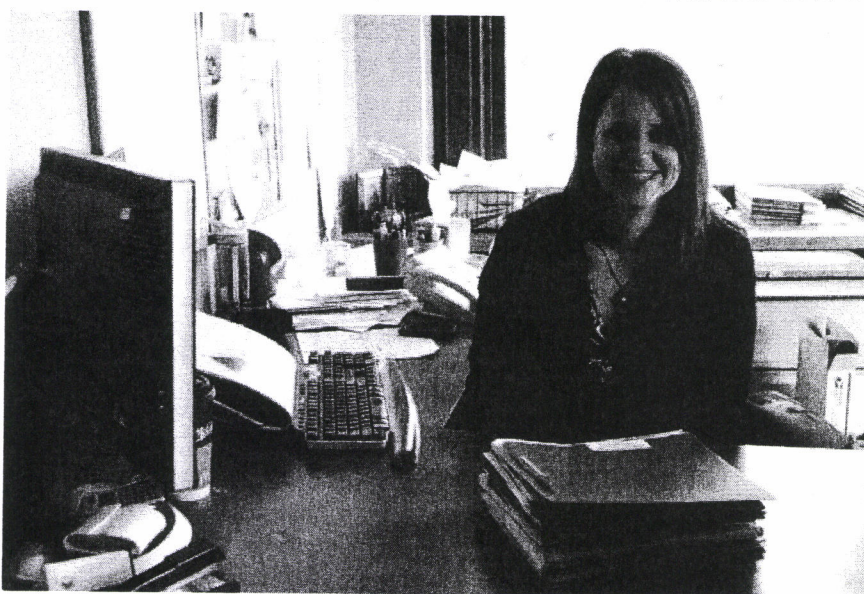
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Public defenders seek to lighten load: Claim department understaffed and overbooked

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Jenny Kaleczyc, regional deputy public defender for the state's Helena office, sits by a fresh stack of cases. Public defenders are asking the Legislature for help, saying they are overwhelmed with work. / Amy R. Sisk/Community News Service

Written by
Amy R. Sisk
Community News Service

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HELENA – Jenny Kaleczyc sits at her desk on the third floor of a downtown Helena building with an overflowing inbox and fresh stack of folders – 10 more cases to add to her current workload of 75.

"We lie awake worrying about what we couldn't get to, and wake up in the middle of the night making our to-do list for the next morning," the regional deputy public defender said.

Her office isn't unique. The other 13 public defender offices across Montana struggle to make do with limited resources and an ever-increasing workload as they represent low-income individuals in court.

This week, they are asking the Legislature for more money from House Bill 2, the state's main two-year, \$9 billion budget bill. It

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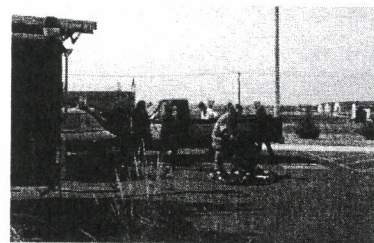
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passed the House last month, and senators are now busy hashing out its details.

"The bottom line of what we're going to tell them is that the constitutional duty of the state of Montana will fail," said Richard "Fritz" Gillespie, chairman of the state's Public Defender Commission.

Originally, the state office asked for 77 new full-time employees. Gov. Steve Bullock reduced that number to 37 in his budget request. The version of the budget passed out of the House gave the office eight new FTEs and a \$5.7 million increase in funding over the next two years.

Those in charge of the state office say that increase won't solve the problems that plague the system's attorneys and clients. They say overbooked schedules mean lawyers cannot give clients the attention they deserve, which creates a greater potential for mistakes or wrongful convictions.

"Individuals languish in jail longer than they need to, which costs money while they are sitting there," said Wade Zolynski, chief appellate defender. "When you don't have the time to file a bond reduction motion or to do the types of motions that you are supposed to be doing, those things are either delayed significantly, or they don't get done at all."

But the public defender office is just one piece of the pie. Five other agencies are vying for funds in its section of the budget.



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Public defenders seek to lighten load: Claim department understaffed and overbooked

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"There are a lot of needs out there," said Rep. Steve Gibson, R-East Helena. "Public defenders are one of them."

Gibson heads the appropriations subcommittee on justice issues. He said lawmakers are juggling a number of additional funding requests at the same time government agencies ask for more money. Some of those measures include bills to better-fund public schools, state employee salaries and the state pension system.

He and others familiar with the office say it has been shortchanged since it was established in 2006. Public defenders also must take on civil cases, even though the attorneys were initially intended to handle only criminal cases.

"Even if the Legislature were to give them everything they ask for, that's not going to solve the problem," Gibson said.

He added that lawmakers are more eager to give agencies money when they can see that departments have taken steps to become more efficient.

That's why he's supporting an effort by Rep. Kimberly Dudik, D-Missoula, to fund an interim study of the system's problem when the session adjourns.

"It looks at staffing issues and it looks at pay issues, but it also looks at how the organization could possibly be reorganized so that it wouldn't just be a more money issue, but it would be an efficiency issue," Dudik told the House Judiciary Committee last week.

Dudik suggested that instead of taking on a broad range of clients, public defenders could focus on specific types of cases.

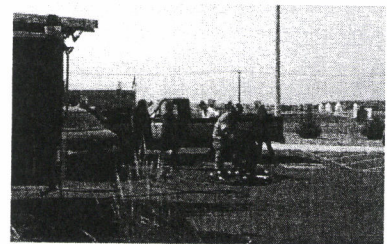
Gibson said the public defender office could work more effectively if it did not have to accept certain cases, such as those related to neglect or crimes that warrant little or no jail time. He added that the

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governor's office could shift attorneys from other departments to the public defender office to ease the burden on current employees.

Other groups are also keeping a close eye on the office, including the American Civil Liberties Union of Montana.

"If they continue to ignore their constitutional obligation, it will lead to litigation that, if favorable to the people in need of indigent defense, will cost the state millions of dollars that could be better spent in other ways," said Scott Crichton, executive director of the ACLU of Montana.

His organization has already sued the state once over inadequacies in the public defender system. That lawsuit resulted in the establishment seven years ago of the state public defender office that now oversees 13 offices across Montana.

Kaleczyc and the 15 people who work in her regional office aren't in it for the money, she said. They put up with overbooked schedules for as long as they can, but often the \$43,000 starting salary doesn't cover their bills and student loans.

Her office faces a high turnover rate, as public defenders move on to higher paying jobs in government or with law firms throughout Montana.

"We have some great new attorneys," Kaleczyc said. "But I fear that if we don't fix these problems, we are going to lose them too."

Reporter Amy Sisk can be reached at amy.sisk@umontana.edu. Follow @amysisk on Twitter for the latest from the Capitol.



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